90-1717

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MARY LOUISE TAYLOR, Petitioner

-vs-

HONORABLE JAMES G. CARR,
UNITED STATES MAGISTRATE, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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April 19, 1991

BEST AVAILABLE COPY

QUESTION PRESENTED

Did the court of appeals err in declining to issue a writ of mandamus to the respondent directing him to impanel a jury to hear petitioner's claims under Title VII of the Civil Rights Act of 1964 for damages due to sexual harassment?

LIST OF PARTIES

The parties to the proceedings in the courts below relevant to this petition are the petitioner, Mary Louise Taylor; in the court of appeals, the respondent herein, the Honorable James G. Carr, and in the district court, the defendants in the underlying civil action, The National Group of Companies, Inc. and John L. West.

Petitioner believes that the corporate defendant in the underlying civil action is wholly owned by the remaining individual defendant in the district court and members of that individual defendant's immediate family.

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IN THE SUPREME COURT OF THE UNITED STATES

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MARY LOUISE TAYLOR, Petitioner

-vs-

HONORABLE JAMES G. CARR,
UNITED STATES MAGISTRATE, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Mary Louise Taylor respectfully asks that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-styled proceeding on February 13, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unpublished. It is reprinted in the appendices herein, p. 1a infra.

The memorandum opinion of the United States District Court for the Northern District of Ohio (Carr, Magistrate) denying reconsideration of the petitioner's request for a jury trial is unpublished. It is reprinted in the appendices herein, p. 4a infra.

The memorandum opinion of the United States District Court of the Northern District of Ohio, (Potter, D.J.) denying petitioner's request for a jury trial is reported at 729 F.Supp. 575. It is reprinted in the appendices herein, p. 24a infra.

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JURISDICTION

After appropriately pursuing administrative remedies, the petitioner and her husband filed their complaint in the district court under Title VII of the Civil Rights Act of 1964 for damages due to sexual harassment and religious discrimination joined with pendent state law claims arising under the common law of Ohio relating to defamation, intentional infliction of emotional distress, and loss of consortium against the petitioner's former employer and employees of that employer.

Following extensive discovery and the filing by the defendants below of a Motion for Summary Judgment and the petitioner's opposition thereto, the district court granted summary judgment

in favor of the defendants below on all counts other than sexual harassment. The district court determined that this matter should be tried to the Court, denying the petitioner's motion to impanel a jury to try that Title VII damage claim.

Subsequently, the parties consented to having this matter presented and tried by the respondent herein, the Honorable James G. Carr, the United States Magistrate. *See* 28 U.S.C. § 636(c)(1)(1988).

Petitioner moved the Magistrate to reconsider the prior district court order in several respects. Pertinent to this petition, however, is solely the claim that the district court erred in denying petitioner's right to a jury trial on her

Title VII federal claim. The respondent United States Magistrate denied on April 28, 1990, the request for a jury trial on petitioners Title VII claim, opining that he was without authority to revisit the district judge's decision in this regard, even though he was now sitting as the ultimate district court decision maker.

Trial was set and subsequently vacated in light of anticipated actions by the Supreme Court of Ohio to interpret state law.

On December 10, 1990, petitioner filed with the United States Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 1651(1988), a petition for a writ of mandamus to direct the United States Magistrate to impanel a jury to hear the petitioner's claim under Title

VII of sexual harassment. The respondent, United States Magistrate declined to respond to the petition for a writ; however, counsel for the defendants below filed a brief in opposition. On February 13, 1991, a panel of the United States Court of Appeals for the Sixth Circuit denied the petition for a writ of mandamus.

Pursuant to 28 U.S.C. § 1254(1) (1988), the petitioner seeks a writ of certorairi from this court to review the judgment of February 13, 1991.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment to the Constitution provides:

> In Suits at common law, where

> the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, §§ 701-18, 78 Stat. 241 (codified at 42 U.S.C. §§2000e-2000e-17) (1988) is excerpted below in pertinent part.

§703(a)(1) (codified at 42 U.S.C. § 2000e-2(a)(1)) (1988) provides in pertinent part:

> It shall be an unlawful employment practice for an employer--(1) to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

§706(g) (codified at 42 U.S.C. § 2000e-5(g)) (1988) provides in pertinent part:

> [T]he court may . . . order . . . back pay . . . , or any other equitable relief as the court deems appropriate.

STATEMENT OF THE CASE

The petitioner Mary Louise Taylor was formerly an employee of the defendant in the underlying civil action in the district court, The National Group of Companies, Inc. The individual defendant in the trial court is the president of the company, John L. West. Insofar as is relevant to this petition, while in the employ of The National Group of Companies, Inc., Ms. Taylor was the victim of sexual harassment in the workplace. Ultimately, Ms. Taylor left the employ of The National Group of Companies, Inc. Thereafter, she pursued her legal remedies before various state administrative agencies.

After receiving her right to sue letter, Ms. Taylor brought suit in the appropriate federal district court, alleging violations of Title VII of the Civil Rights Act of 1964 and the common law of the state of Ohio. The District Court granted defendants' motion for summary judgment on all state common law counts. Given the conflict in testimony, summary judgment on the claims of sexual harassment was precluded.

As described in the Jurisdiction statement *supra,* the parties then agreed to have the matter tried by the United States Magistrate, the respondent herein. The Magistrate allowed an amendment to the complaint to add a state claim cognizable under the Ohio civil rights act.

The sole issue before the Court in this proceeding is the availability of a jury trial on petitioner's Title VII claim of sexual harassment in the workplace. The mandamus proceeding in the court of appeals and this petition for certiorari have but a limited, although constitutionally profound, objective: the trial of this matter before a jury in the district court.

THE WRIT OF CERTIORARI SHOULD ISSUE TO PROVIDE TO THE PETITIONER HER CONSTITUTIONAL ENTITLEMENT OF A JURY TRIAL.

A. This Court Should Hold that Jury Trials are Constitutionally Compelled in Claims under Title VII of the Civil Rights Act of 1964.

The command of the Seventh Amendment, that "the right of trial by jury shall be preserved" stands as a monument to the good sense of the members of the First Congress. The principle of trial by one's peers in a civil case is a bedrock provision of our jurisprudence. Later in our history, this Court commented:

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

Jacob v. City of New York, 315 U.S. 752, 752-53 (1942).

See contrasting, but supportive views on the fundamental nature of the jury trial in our constitutional scheme in *Galloway v. United States*, 319 U.S. 372, 392, 396-

407 (Black, Douglas & Murphy, JJ. dissenting) (1943); *Parsons v. Bedford,* 26 U.S. (Pet.) 433, 447 (1830).

This petition provides this Court with the opportunity to affirmatively answer the question it has only recently reserved, "[b]ecause [the litigant] does not argue that he was entitled to a jury trial on his Title VII claim, we express no opinion on that issue here." *Lytle v. Household Mfg. Co.* 110 S.Ct. 1331, 1335 n.1 (1990). Similarly, on several prior occasions, this Court has declined to answer the question concerning the constitutional or statutory right to a jury trial in Title VII cases, merely commenting upon it in *dicta. Lorillard v. Pons*, 434 U.S. 575, 581-82 (1978); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-18 (1975) (Supreme Court has not

determined that a right to a jury trial exists in a Title VII case).

Reversing the court of appeals order below where it declined to direct the district court trier of fact, the respondent United States Magistrate, to impanel a jury to hear the title VII sexual harassment claim, will establish firmly the right to a jury trial in title VII cases seeking monetary damages and ancillary other relief.

B. Mandamus is the Appropriate Remedy to Ensure a Jury Trial.

Petitioner sought in the court of appeals below a writ of mandamus, pursuant to 28 U.S.C. § 1651 (1988), directing the respondent United States Magistrate to impanel a petit jury to

hear the petitioner's claims of sexual harassment under Title VII of the Civil Rights Act of 1964. *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57 (1986).

This Court has repeatedly held that the office of a writ of mandamus is to ensure that the correct trier of fact functions in the district court. Specifically, a writ of mandamus is used to impanel a jury when one is consitutionally compelled. *Dairy Queen, Inc. v. Westover*, 369 U.S. 469, 472 (1962)("Our decision . . . emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury . . . ."); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 511 (1959)("[T]he right to grant mandamus to require jury trial where it has been

improperly denied is settled.").

The court of appeals improperly relied upon *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62 (1978) and *Kerr v. United States Dist. Court*, 426 U.S. 394, 402-03 (1976) to deny petitioner's requested relief. This decision ignored the teachings of *Dairy Queen* and *Beacon Theatres*.

The petitioner was improperly denied her request for a writ of mandamus from the court of appeals.

C. The Court's Seventh Amendment Jurisprudence Compels the Ordering of a Jury Trial in Damage Actions.

No question can be raised concerning the availability of a jury for monetary

damage claims. These suits represent the bedrock of common law actions at law.

The Court in *Ross v. Bernhard* commented:

> As our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.

396 U.S. 531, 538 n.10 (1970).

Similarly, the Court has held that statutory actions are also entitled to factual resolution by a jury where the Congress has determined to use the judiciary to vindicate claims and the actions are analogous to actions known at common law. *See Curtis v. Loether,* 415 U.S. 189, 193-94 (1974)(the right to a

jury trial exists even though the right to such relief is created by a federal statute).

The merger of law and equity in the modern civil action has occasioned an even sharper definition of the paramount position played by the legal remedy over the equitable one. Claims which are deemed to be legal must be resolved prior to those of equitable heritage. "[O]nly under the most imperative circumstances, circumstances which . . . we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 472-73 (1962), *(quoting Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 510-11 (1959)).

In her Amended Complaint, petitioner's prayer is as follows;

> WHEREFORE, your plaintiffs pray for *damages in the amount of $2,500,000.00 against the defendants pursuant to 42 U.S.C. Section 2000e-5(g) and the common law of Ohio, and exemplary damages in the amount of $75,000.00 for common law violations,* reasonable attorney fees as provided by law, and the private records relevant to the occurrences detailed herein concerning the plaintiff, MARY LOUISE TAYLOR and for such further relief as may be just and proper.

(emphasis supplied)

The petitioner seeks monetary damages for her back pay from the date of her unlawful discharge until the time of trial. Back pay awards in a civil rights action are akin to a civil action to remedy civil rights violations--actionable at law--and dissimilar to any

equitable remedy such as restitution. Scholarly commentaries have noted this distinction as well. L. Tribe, American Constitutional Law 1310 (2nd ed. 1988); D. Dobbs, Remedies 69 n.18 (1978); W. Defuniak, Handbook of Modern Equity 133-34 & 140 (1956).

As can be seen, the gravamen of petitioner's suit is her claim for money damages stemming from Title VII and common law violations. No reinstatement is sought. In fact, the only claimed relief which is remotely equitable in nature is petitioner's desire to cleanse her personnel records following success on her claims of substantive law violations.

D. Had Congress Chosen to Disallow Jury Trials, the Act Would so Provide or

an Administrative Forum Could Have Been Established to Adjudicate Petitioner's Claims.

Congress settled upon the use of the judiciary as the means of ultimately vindicating federal rights to be free from the ravages of sexual discrimination. The Congress takes the courts of course, subject to the command of the Seventh Amendment. *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974). The Court has recognized that the Congress may deny the right to a jury trial when new, public rights are established, the vindication of which is to occur within an administrative agency. *See NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1, 48-49 (1937) (sustaining the National Labor Relations Act against Commerce Clause constitutional challenge

and Seventh Amendment constitutional challenge due to the absence of a jury in Board proceedings).

In choosing the courts, little was said in the congressional debates to provide a definitive congressional intent with regard to jury trials. Comments rendered are too fragmentary to be worthy of conclusive weight and many seem to address issues of jury trial in contrast to the contempt power. *Compare* 110 Cong. Rec. S7,214 (daily ed. Apr. 8, 1964) (interpretive memorandum of Sens. Clark and Case); 110 Cong. Rec. S7,255 (daily ed. Apr. 8, 1964) (colloquy between Sens. Case and Ervin); 110 Cong. Rec. H2,824-25 (daily ed. Feb. 10, 1964)(remarks of Rep. Cellar); 110 Cong. Rec. H2,737 (daily ed. Feb. 10, 1964)(remarks of Rep. Libonati).

With the Congressional view being so opaque, the Court must confront the constitutional command of the Seventh Amendment. This approach is consistent with the Court's holding in *Tull v. United States*, 481 U.S. 412 (1987) where a jury trial right was affirmed under provisions of the Clean Water Act. The Court concluded that "[g]iven this statutory silence [in the act], we must answer the constitutional question presented [and provide for the jury]." *Id.* at 417 n.3.

E. The Court Has Been Instrumental in Construing Broadly the Right to a Jury Trial.

The Court has evidenced a clear and unrelenting series of decisions to afford jury trials in statutory causes of

action. At the turn of the century, the Court recognized the right to a jury trial in certain immigration proceedings. *Hepner v. United States,* 213 U.S. 103, 115 (1909). The *Dairy Queen* Court followed this lead in trademark actions. 369 U.S. at 477. Juries have been made available under Title VIII of the Civil Rights Act of 1964. *Curtis v. Loether,* 415 U.S. 189, 196-98 (1974).

Other decisions have further supported the right to jury trial in statutory areas as diverse as bankruptcy (*Granfinanciera, S.A. v. Nordberg,* 109 S.Ct. 2782 (1989)), to actions for back pay for an alleged breach of a union's duty of fair representation under section 301 of the Labor-Management Relations (Taft Hartley) Act, *Teamsters, Local 391 v. Terry,* 110 S.Ct. 1339 (1990); claims under the Age Discrimination Employment

Act of 1967 (*Lorillard v. Pons*, 434 U.S. 575 (1978)); and actions under 42 U.S.C. § 1981 (*Moore v. Sun Oil Co. of Pennsylvania*, 636 F.2d 154, 156 (6th Cir. 1980)).

As further evidence that the views of the court of appeals below may not fully be consonant with the views of this Court in employment-related matters, *see Curtis v. Loether*, *supra*; *Lytle v. Household Manufacturing Company*, *supra*; *Teamsters, Local 391 v. Terry*, *supra*, a petition for certiorari recently has been granted to review the appellate court's denial of a demand for a jury in a case under the Labor-Management Reporting and Disclosure Act. *Wooddell v. Electrical Workers (IBEW), Local 71*, 135 LRRM 2926 (S.D. Oh.), *aff'd in part, remanded in part*, 907 F.2d 151 (6th Cir. 1990), *cert. granted in part*, 111 S.Ct. 951 (1991).

F. Lower Court Decisions Denying the Right to a Jury Trial in Title VII Cases have Misconstrued this Court's Silence and Dicta.

Some lower courts have determined that the right to a jury trial in Title VII cases does not exist. *See* decision of court of appeals below; *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 940 (10th Cir. 1979); *Grayson v. Wickes Corp.*, 607 F.2d 1194, 1196 (7th Cir. 1979); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); *Harkless v. Sweeney Indep. School Dist.*, 427 F.2d 319, 324 (5th Cir. 1970), *cert. dismissed under Rule 60*, 400 U.S. 991 (1971); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir 1969). Commentators have rejected the view that

no jury trial is available in a Title VII case. *See e.g.* Note, *Jury Trial Right Under Title VII: The Need for Judicial Reinterpretation,* 6 Cardozo L. Rev. 613 (1985), Comment, *Right of Jury Trial in Suits for Back Pay: Title VII or Section 1981,* 12 Memp. St. U. L. Rev. 355 (1982).

And while some lower federal courts have joined these opinions, some have opined that the decision is wrong or that new concepts of jurisprudence have necessarily overruled the prior premise.

In *Ochoa v. American Oil Co.,* 338 F. Supp 914, 921-23 (S.D. Tex. 1972), the district court believed the denial of the right to jury trial in Title VII cases to be wrong, but the court believed itself bound by the controlling precedent of the Court of appeals for the Fifth Circuit.

Finally, a district court in a Southern jurisdiction has determined, following a careful review of the *dicta*-filed history, to grant a jury trial in a Title VII case. The United States District Court for the Northern District of Alabama has demonstrated that prior lower court precedent, a questionable lineage in of itself, is no longer persuasive in light of expanding rights under the Seventh Amendment. In *Beesley v. Hartford Fire Ins. Co.*, the district judge stated: "After a hard search, this [district] court has been unable to find a *single case* wherein the Supreme Court has actually *held* that a party in Title VII case cannot deem a jury. Lower appellate courts have simply assumed and presumed." 717 F. Supp. 781, 783 (N.D. Ala. 1989) (emphasis in original).

See, for fuller analysis of the opinion, Horowitz, *Judge Acker's Last Stand: The Northern District of Alabama's Lonesome Battle for the Right to trial by Jury under Title VII*, 34 J. Urb. & Contemp. L. 135 (1991). Thereafter, the same district court granted the request for a jury trial in two other reported opinions. *Walker v. Anderson Elec. Connectors*, 736 F. Supp. 253 (N.D. Ala. 1990); *Walton v. Corwin Equip. Co.*, 733 F. Supp. 327 (N.D. Ala. 1990).

G. Summary: The Call for a Jury Demands that a Writ Issue to Compel the Jury's Impanelment.

The better reasoned emerging court opinions support the conclusion that a jury trial should be had in a Title VII case. The clear command of the Seventh Amendment, the historical and modern

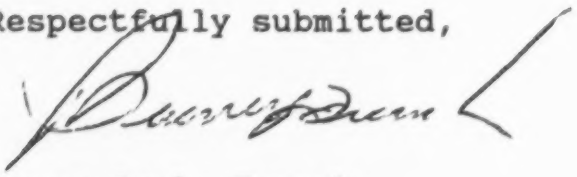
analogues, and the inconclusive congressional debate all compel but one conclusion: that a jury trial should be available to the petitioner in this case. No sound reason presently exists to deny this right. This case presents a clear opportunity for the Supreme Court to clarify the law affecting Title VII actions and to make available to litigants the fundamental bedrock of our jurisprudence, a trial by jury.

CONCLUSION

For the foregoing reasons, the petitioner asks that a petition for certiorari issue to the United States Court of Appeals for the Sixth Circuit to consider its judgment and order denying the petitioner her right to a jury trial on her claim under Title VII of the Civil

Rights Act of 1964 of sexual harassment.

Respectfully submitted,



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No. 90-4079

Filed
Feb. 13, 1991

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: MARY LOUISE TAYLOR, Petitioner.	)	ORDER

BEFORE: JONES and NELSON, Circuit Judges; and JOINER, Senior District Judge.*

The petitioner seeks a writ of mandamus directing the magistrate for the Northern District of Ohio to empanel a petit jury for the trial of her Title VII claim. The magistrate has declined to file a response. The defendant in the action below has filed a response.

The remedy of mandamus is a drastic

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*The Honorable Charles W. Joiner, Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.

one, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought. Will v. Calvert Fire Insurance Co., 437 U.S. 655, 661-62 (1978); Kerr v. United States District Court, 426 U.S. 394, 402-03 (1976). Several factors are balanced in determining whether to grant a petition for a writ of mandamus, including whether the lower court's ruling was clearly erroneous. See In Re: King World, 898 F.2d 56, 58-59 (1990); In Re: Bendectin Products Liability Litigation, 749 F.2d 300, 303 (6th Cir. 1984). This court has expressed the opinion that no right to a jury trial attaches in Title VII claims. See Hildebrand v. Bd. of Trustees of Mich. S. Univ. 607 F.2d 705, 708 (6th Cir. 1979); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), vacated and

remanded on other grounds, 431 U.S. 951 (1977), overruled on other grounds, Harris v. Richards Mfg. Co., Inc., 675 F.2d 811, 814 (6th Cir. 1979). Upon review and consideration, we conclude that the plaintiff's petition does not establish a right to relief in mandamus.

It is therefore ORDERED that the petition for a writ of mandamus is denied. Fed. R. App. P. 21(b).

ENTERED BY ORDER OF THE COURT

/s/
Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Filed
Apr. 26, 1990 a.m.

Mary Louise Taylor, et al.,

Plaintiffs, **Case No. 89CV7009**

vs.

The National Group of Companies, Inc., et al.,

Defendants. **Memorandum & Order**

This is a Title VII case originally assigned to the Honorable Judge John W. Potter. On December 14, 1989, pursuant to consent of parties, Judge Potter entered a Decision as to the Magistrate Exercising Jurisdiction and ordered this action referred to the undersigned to conduct all further proceedings and enter judgement in accordance with 28 U.S.C. §636(c). Additionally, parties did not consent to have this case appealed ont he record to a district judge and agreed that appeal shall be to the Sixth Circuit

Court of Appeals.

This case was initiated by complaint filed January 5, 1989 in which plaintiffs sought relief from alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., assault and battery, and numerous other common law torts. On December 8, 1989 Judge Potter issued a Memorandum and Order granting defendants' motion for summary judgment on all claims except for plaintiffs' Title VII claim of sexual discrimination and harassment. Judge Potter further ordered that plaintiffs' request for trial by jury be denied.

The cause is presently before this court on issues raised in plaintiffs' Motion for Leave to File an Amended Complaint Pursuant to FRCP 15; Reset Trial Date; and to Reconsider Certain

Prior Rulings by the Court, Etc. filed February 6, 1990. Defendants filed their response on March 9, 1990.

Plaintiffs raise the following three issues: 1) that trial date set for September 17, 1990 by order of the undersigned be changed; 2) that the undersigned reconsider Judge Potter's decision embodied in his December 8, 1990 Memorandum and Order as to plaintiffs' intentional infliction of emotional distress claim and plaintiffs' request for jury trial; and 3) that they be permitted to file a first amended complaint pursuant to Rule 15(b) of the Federal Rules of Civil Procedure to add a pendent state claim alleging that defendants violated provisions of Chapter 4112 of the Ohio Revised Code.

Plaintiffs' first issue has been resolved. As to the second issue, plaintiffs' motion is denied. Plaintiffs' motion as to the third issue is granted.

Trial Date

Pursuant to a pretrial conference held on March 9, 1990 I ordered that the trial date previously set for September 17, 1990 be vacated and reset for December 10, 1990, thereby addressing plaintiffs' request for change of trial date raised in the instant motion.

Reconsideration of Prior Rulings of Judge Potter

Plaintiffs move the undersigned to reconsider Judge Potter's prior order

denying the state law claim of intentional infliction of emotional distress and plaintiffs' request for a jury trial on the remaining Title VII claim. Plaintiffs' counsel devotes ten pages of a fifteen page brief to analysis of the substantive legal questions underlying the issues he raises for reconsideration but fails to explain the jurisdictional basis upon which my authority to make such determinations rests. I can find no authority, nor is any provided, to support counsel's assumption that I have jurisdiction to reconsider the prior rulings of the district court judge. For the following reasons plaintiffs' motion for reconsideration is denied.

The ground upon which plaintiffs' counsel presupposes that a federal

magistrate is jurisdictionally empowered to reconsider prior rulings of a previously presiding district court judge is, at best, tenuous. While unarticulated, it would appear that plaintiffs' counsel draws his conclusion that I have jurisdiction to reconsider Judge Potter's prior rulings from the following factors: 1) that the parties have consented to their case being determined by a federal magistrate; 2) that jurisdiction is, in general, permitted under the Federal Magistrates Act, 28 U.S.c. §631 et seq., Pub.L. 90-578, Title I, § 101, Oct. 17, 1968, 82 Stat. 1108, as amended; 3) that the action was referred to a magistrate by the district judge who had previously presided over it; and 4) that the parties agreed that appeal from my rulings would not go to the district judge as permitted

under Rule 3.1 of the Federal Rules of Appellate Procedure and 28 U.S.C. §636(c)(1) and (3).

The foregoing provides no support for plaintiffs' counsel's argument. It is simply not the case that a magistrate's jurisdiction is, by fiat, somehow merged with that of the district judge to an extent sufficient to vest the magistrate with the authority to reconsider and set aside or alter prior decisions of the district judge.

When satisfied, the conditions enumerated in the preceding paragraph will deprive a district judge of the authority to hear an appeal form a final determination rendered by a magistrate, see, Freeman v. Petsock, 820 F.2d 628 (3rd Cir. 1987). Note, that this

limitation on the review authority the district judge is expressly provided for by rule and statute. See, Rule 3.1 Fed. R. App. Pro.; 28 U.S.C. § 636 (c)(3), (4). However, the foregoing restriction on the review authority of a district judge does not entail the conclusion that federal magistrates are vested with the authority to reconsider prior rulings of district judges. Section 636 of the Federal Magistrates Act, which establishes the jurisdiction and powers of federal magistrates, does not authorize magistrates to reconsider prior rulings of a district judge in referred cases.

Further, I find neither reason nor authority to read such prerogatives into the Act. The powers of a federal magistrate are limited relative to those

of district judges.

Magistrates are appointed by the district judges in each district. The magistrates are given all the powers previously exercised by United States commissioners, such as issuing warrants, conducting preliminary examinations, imposing conditions of release for criminal defendants, and the like. In addition, they can try misdemeanors, although defendant may elect to be tried before a judge of the district court. They can be designated to hear a wide variety of motions in both criminal and civil cases. On some of these matters the magistrate may make a determination, subject to reconsideration by a judge, while on others the magistrate may conduct an

> evidentiary hearing and submit to a judge proposed findings of fact and recommendations for disposition, but the judge must make a de novo determination of matters in the magistrate's recommendations to which objection is made. A magistrate may, upon the consent of the parties, conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case. Finally, magistrates may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3505. Federal magistrates are thus, to some extent, subject to the authority of the

district judge, but the converse is not true. Indeed, pursuant to 28 U.S.C. § 636(c)(6) the district court may "for good cause shown on its own motion ... vacate a reference of a civil matter to a magistrate under this subsection." It appears that the district judge always retains some degree of control over cases adjudicated in his court.

The authority of a federal magistrate is limited in a variety of ways. For the foregoing reasons I decline to review the rulings of Judge Potter denying plaintiffs' intentional infliction of emotional distress claim and plaintiffs' request for jury trial. Plaintiffs' motion in this regard is, thereby, denied.

Amendment of Complaint

and Pendent Jurisdiction

Plaintiffs seek leave to file a first amended complaint to add a state claim alleging violation of Chapter 4112 of the Ohio Revised Code. Plaintiffs assert that R.C. § 4112.99 provides for judicial remedy to violations of Chapter 4112. Plaintiffs argue that permitting the additional claim will not prejudice defendants as they are already on notice of plaintiffs' claim in this regard. Plaintiffs also argue that amending the complaint and adding the claim will effect no adverse impact upon the efficient operation of the court.

Chapter 4112 of the Ohio Revised Code is comprehensive legislation fashioned to provide various methods by which aggrieved parties may seek redress

for unlawful employment discrimination. Section 4112.02(A) of the Revised Code provides that it shall be an unlawful discriminatory practice "[f]or any employer, because of the ... sex... of any person to discharge without just cause,... or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." Section 4112.08 provides that the pertinent sections of Chapter 4112 shall be liberally construed to achieve to purposes for which they were enacted. "R.C.Chapter 4112 was intended to add protections for victims of sexual harassment rather than reduce the protections and remedies for such conduct." Helmick v. Cincinnati Word Processing, Inc., 45 Ohio St. 3d 131, 135

(1989). Construed accordingly, plaintiffs' allegations of sexual harassment and discrimination would fall within the scope of violations covered by R.C. § 4112.01(A).

Defendants oppose plaintiffs' motion to amend arguing that the addition of a pendent state law claim is inappropriate in an action brought in federal court based on an alleged Title VII violation. Defendants argue that plaintiffs motion should be denied for the following reasons: the state law which forms the basis of the claim plaintiffs wish to add is novel and little case law has developed in Ohio to interpret it; introduction of the state law claim will consume an inordinate amount of time, effort, and expense; and the state law issue proposed by plaintiffs will

predominate over or distract from the federal claim which is the basis of this court's jurisdiction.

For the following reasons I find plaintiffs' motion for leave to amend well taken.

Amendment of Complaint

Amendment of complaints is controlled by Rule 15 of the Federal Rules of Civil Procedure. Rule 15(a) provides that where a party seeks leave of the court to amend a complaint "leave shall be freely given when justice so requires." Rule 15(a) Fed. R. Civ. Pro. Generally, courts liberally construe motions for leave to file amended complaints. See, Foman v. Davis, 317 U.S. 178 (1962). Given this policy of

liberality behind Rule 15(a) courts are obliged to give due consideration to motions to amend. Marks v. Shell Oil Co., 830 F.2d 68, 69 (6th Cir. 1987).

Although generally recognizing the presumption in favor of granting motions for leave to amend, courts will examine various factors in order to determine whether leave to amend is warranted. These include undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of the amendment. In any case, the decision to grant a motion for leave to amend is at the court's discretion and depends on the particular circumstances involved.

Foman, supra; Hageman v. Signal L. P. Gas, Inc., 486 F.2d 479 (6th Cir. 1973).

Plaintiffs refer to the Sixth Circuit case of Howard v. Kerr Glass Manufacturing C., 699 F.2d 330 (6th Cir. 1983) in support of the proposition that additional state claims are the proper subject of a motion to amend. Contrary to plaintiffs' contention, however, Howard stands only for the proposition that amendments to pleadings are to be construed liberally by the courts where there is no surprise to the adversary party. It does not expressly address the issue of amending pleadings with additional state law claims. More importantly, Howard is not a Title VII action and, thus, is not a particularly suitable precedent for assessing the propriety of adding a state law claim to

a complaint in an action brought in federal court where jurisdiction is based solely on an alleged Title VII violation.

Pendent Jurisdiction

An arguably futile amendment would be one where the movant's proposed additional state law claim is precluded because pendent jurisdiction is inappropriate. Pendent jurisdiction is proper if the following criteria are met: 1) the action is in federal court on a federal claim sufficiently substantial to confer subject mater jurisdiction on the court; 2) the state and federal claims must derive from a "common nucleus of operative fact"; and 3) the claims are such as would ordinarily be adjudicated in one proceeding. See, Aldinger v. Howard, 427 U.S. 1 (1976); United Mine

Workers v. Gibbs, 383 U.S. 715 (1966); Gaff v. Federal Deposit Insurance Corp., 814 F.2d 311, 319 (6th Cir. 1987); Transcontinental Leasing, Inc. v. Michigan National Bank, 738 F.2d 163, 165-66 (6th Cir. 1984).

Even if pendent jurisdiction is shown to exist the court has broad latitude in determining whether it is appropriately exercised in any given case. Factors a court will weigh in determining the suitability of a pendent claim include judicial economy, convenience and fairness to litigants, the unsettled nature of the applicable state law, confusion arising from treating divergent theories of relief, and the relative dominance of the state versus the federal claims. See, Carnegie-Mellon University v. Cohill, 484

U.S. 343 (1988); Moor v. County of Alameda, 411 U.S. 693 (1973).

In the instant case it has already been established that the first criterion for determining the appropriateness of pendent jurisdiction has been met. Plaintiffs' Title VII claim confers subject matter jurisdiction on this court. Secondly, it is readily apparent that plaintiffs' state and federal claims derive from a "common nucleus of operative fact." The circumstances that gave rise to plaintiff, Mary Louise Taylor's, allegations of sexual harassment in the work place support a Title VII claim and a claim based on § 4112.02 (A) of the Ohio Revised Code. Finally, common sense would seem to dictate that the two claims presently under consideration would ordinarily be

expected to be tried in one judicial proceeding. Thus, pendent jurisdiction over plaintiffs' state law claim would not appear to be improper in this case.

However, in addition to the criteria elucidated in United mine Workers v. Gibbs, supra, it has been suggested that an additional level of analysis must be added for a proper determination of the question of pendent jurisdiction. "Beyond this constitutional minimum, there must be an examination of the posture in which the nonfederal claim is asserted and of the specific stature that confers jurisdiction over the federal claim, in order to determine whether 'Congress in [that statute] has... expressly or by implication negated' the exercise of jurisdiction over the particular nonfederal claim." Owen

Equipment & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978), quoting, Aldinger v. Howard, supra. Although Owen may be distinguishable on the basis that the question expressly dealt with in that case was the Court's pendent party jurisdiction over a non-diverse third party defendant, the language relied on by the Court was broad and spoke to pendent claims and not merely pendent parties.

Defendant contends that the additional criterion for determining the suitability of pendent jurisdiction announced by the Court in Owen is applicable to the present case. In this regard defendant directs the court's attention to cases decided in several district courts which have held that pendent state claims can never attach to

Title VII claims because of the unique procedural characteristics and limited remedial provisions of the statute. See, e.g., Guzman Robles v. Cruz, 670 F. Supp. 54 (D. Puerto Rico 1987); Frye v. Pioneer Logging Machinery, Inc., 555 F. Supp. 730 (D.S.C. 1983); Bennett v. Southern Marine Management Co., 531 F. Supp. 115 (M.D. Fla 1982); Jong-Yul Lim v. International Institute of Metropolitan Detroit, Inc., 510 F.Supp. 722 (E.D. Mich. 1981).

Defendants also advert to several district court cases which have declined to exercise pendent jurisdiction over related state law claims in actions where federal subject matter jurisdiction is founded on Title VII for reasons other than the alleged structural inapplicability of Title VII. See, e.g., Billings v. Stone & Webster Engineering

Corp., 678 F. Supp. 984 (D. Conn. 1988); Barbetta v. Chemlawn Services, Corp., 669 F. Supp. 569 (W.D.N.Y 1987).

Other courts have permitted pendent jurisdiction in Title VII actions, rejecting the argument that Title VII implicitly negates the addition of pendent claims. See, Glezos v. Amalfi Ristorante Italiano, Inc., 651 F. Supp. 1271 (D. Md. 1987); Guyette v. Stauffer Chemical Co., 518 F. Supp. 521 (D.N.J. 1981).

Those courts which have characterized Title VII as implicitly negating pendent jurisdiction generally rely on the argument that the remedies usually available under state law, particularly compensatory and punitive damages and the right to a jury trial,

subvert the equitable and remedial purposes of Title VII. See, Gerlach v. Michigan Bell Telephone Co. 448 F. Supp. 1168, 1173 (E.D. Mich. 1978), and cases cited above. Further, these cases state that the intent of Congress as applied to cases brought under Title VII is that they should be "in every way expedited." 42 U.S.c. § 2000e-5(f)(5). In this regard one court has stated,

> Once it is clear that private actions were intended to be expeditious, it is also clear that the exercise of pendent jurisdiction in such actions is fundamentally inconsistent with their intended form. Indeed, some of the very purposes for which plaintiffs may seek to join state law actions, including the availability of

broader relief and a jury trial, are the sort of relief and procedure that Congress implicitly rejected in favor of a streamlined remedy.

Mongeon v. Shellcraft Industries, Inc., 590 F. Supp. 956 (D. Vt. 1984). In the context of the mandate for expedited review explicit in Title VII, as well as a matter of comity between state and federal courts, it is arguable that needless decisions of state law should be avoided.

On the other hand the arguments relied on by those courts unpersuaded by the view that Congress intended to negate pendent jurisdiction in Title VII actions point to the fact that Congress has rejected amendments making Title VII an exclusive remedy for employment

discrimination. 110 Cong. Rec. 13650-13652 (1964). See, Glezos, supra, 651 F. Supp. at 1274. Additionally, in its review of the Equal Employment Opportunity Act of 1972 the Senate rejected an amendment that would have deprived a Title VII claimant of the right to sue under 42 U.S.C. § 1981. See, Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459 (1975), referring to, 118 Cong. Rec. 3371-3373 (1972).

Many of the courts that have denied pendent jurisdiction in Title VII actions have observed that the various limitations imposed by Congress on Title VII actions - e.g., the initial requirement that claims be referred to administrative agencies, 42 U.S.C. § 2000e-5(c); the permissible reference of the case to a special master, 42 U.S.C. §

2000e-5(f)(1); the absence of entitlement to a jury trial, 42 U.S.C § 2000e-5(f)(4); and the restriction on available relief to back pay and other, generally equitable and noncompensatory and nonpunitive, awards, 42 U.S.C. § 2000e-5(g) - cannot serve to obstruct joinder of claims brought under other federal laws which do not embody these limitations. See, for example, Jong-Yul Lim, supra, 510 F. Supp. at 725.

In denying pendent jurisdiction to Title VII actions these courts appear to have ignored the fact that the Supreme Court has addressed itself, albeit obliquely, to this issue. "[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other

applicable state and federal statutes." Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974). Admittedly, the issue addressed by the Court in Alexander involved an employee's right to a trial de novo under Title VII notwithstanding the prior submission of his claim to final arbitration under a collective bargaining agreement. Yet, the Court's statement of the Congressional intent animating the enactment of Title VII is clear. "Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." Id., at 48, 49. "[T]itle VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes." Id., at 48, n. 9 (quoting, Interpretive Memorandum from bill co-sponsor Senator

Joseph Clark, 110 Cong. Rec. 7207 (1964)). That additional claims may provide for jury trial or permit forms of relief in addition to the equitable relief allowed under Title VII should not preclude pendent Jurisdiction in cases where it is otherwise warranted.

It appears that the majority of district courts that have addressed this issue have concluded, in applying the Owens criterion to the pendent jurisdiction analysis, that Title VII implicitly negates a claimant's opportunity to raise state issues in actions whose subject matter jurisdiction is based exclusively on Title VII. I am not persuaded. It is my opinion that a proper reading of the legislative history of Title VII and its interpretation by the Supreme Court shows that Title VII

does not implicitly negate pendent state claims.

The requirement that Title VII claims initially be brought before an administrative agency has little bearing on the question of whether Congress implicitly negated the exercise of federal jurisdiction over state claims that might be added if the Title VII action is subsequently brought in a district court. The permissible reference of Title VII claims to a special master, while reaching to the important concern of expediting these cases, is not dispositive of the implicit intent of Congress in regard to pendent jurisdiction. Finally, pendent state claims which afford legal remedies and jury trial would cause no greater delay than otherwise joinable federal claims

which afford jury trial and remedies not available under Title VII. See, Glezos, supra, 651 F. Supp. at 1275.

It being my opinion that pendent state claims are not implicitly negated in Title VII actions it remains to be determined whether it would be a proper exercise of this court's authority to permit plaintiffs to amend their complaint to add a claim based on Chapter 4112 of the Ohio Revised Code. "Pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." Id., at 1275. See, also, Gibbs, supra, 383 U.S. at 726-27. The various factors weighed by courts when considering the suitability of trying state and federal claims in the same proceeding include judicial economy, convenience, fairness to litigants, the degree to which the state law is settled,

the predominance of the state issue as to questions of proof, scope of issues, or remedy, and jury confusion.

Ohio Revised Code § 4122.99, as amended September, 28, 1987, provides that one who violates Chapter 4112 may be subject to a civil cause of action for damages or other appropriate relief. Plaintiff presently has an action alleging violations of Chapter 4112 pending before the Ohio Civil Rights Commission. The OCRC has determined that probably cause exists to believe that a violation has been committed, and the matter has been set for hearing before an OCRC hearing examiner. Defendants have moved to delay the OCRC proceedings pending the outcome of the instant action. Plaintiffs contend that defendants would not be prejudiced if the

state claim is added to the instant cause because defendants are familiar with plaintiffs' state claim in that it is presently being litigated before the OCRC.

Defendants argue that plaintiffs' state claim involves novel, unsettled, or rapidly developing theories of state law, and, therefore, pendent jurisdiction should not be exercised. Defendants correctly point out the R.C. § 4112.99 was recently amended to permit a judicial cause of action for alleged violations of Chapter 4112, having previously provided criminal penalties for those found guilty of certain violations of Chapter 4112. Defendants also correctly state that there is only one reported state court case interpreting R.C. § 4112.99. See, Helmick v. Cincinnati Word Processing,

Inc., supra.

In assessing the factors weighed by courts when considering the suitability of trying state and federal claims in the same proceeding I fail to see how permitting the additional claim would place an undue burden on the court, be inconvenient, or be unfair to the litigants. Trial on the state claim would not significantly add to the evidentiary requirements already anticipated under the Title VII claim, and defendants are already familiar with plaintiffs' state law claim by virtue of the proceeding pending before the Ohio Civil Rights commission. I also do not believe that the claim based on defendants' alleged violation of Chapter 4112 of the Revised Code would predominate over the Title VII issue as

to questions of proof, scope of issues, or appropriate remedy.

More troubling is the issue raised by defendants' with respect to the novelty and degree of development of the relevant state law. Defendants' reference to the dearth of cases interpreting R.C. § 4112.99 suggests that the court should deny plaintiffs' motion because this law has yet to be examined by Ohio courts.

However, the novelty to which defendants refer is not the novelty of the substantive statutory law of employment discrimination in the State of Ohio. The substantive law of discrimination is embodied in R.C. § 4112.02 which was originally enacted in 1959 and subsequently amended several

times, most recently in 1987. Rather, the novelty of R.C. § 4112.99 is that it permits an aggrieved party to pursue a civil cause of action for an alleged violation of Chapter 4112, where previously it subjected certain classes of violators to criminal penalty. Admittedly, in this context, § 4112.99 is uncharted territory, but this novelty is not comparable to an absence of development in an area of substantive state law that would best be left resolved by the courts of the State of Ohio before it can be addressed by the federal courts.

Defendants' argument in this regard is not well taken. I find that pendent jurisdiction is permissible in Title VII cases, and I further find that it is properly allowed in the instant matter.

Therefore, plaintiffs' motion for leave to amend is granted.

THEREFORE for the reasons stated herein, good cause appearing it is

ORDERED that plaintiffs' Motion for Leave to File an Amended Complaint shall be, and hereby it is, GRANTED, and it is

FURTHER ORDERED that the plaintiffs' Motion to Reconsider Certain Prior Rulings by the Court shall be, and hereby it is DENIED.

IT IS SO ORDERED

/s/
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Mary Louise TAYLOR, et al., Plaintiffs,

v.

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NATIONAL GROUP OF COMPANIES, INC., et al., Defendants.

Case No. 3:89CV7009.

MEMORANDUM AND ORDER

POTTER, J. District Judge:

This matter is before the Court on the motion for summary judgment of all defendants, plaintiffs' opposition and defendants' reply. Counts III and VI of the complaint were previously dismissed voluntarily by plaintiffs. Also before the Court is plaintiffs' request for a jury trial.

Under the Federal Rules of Civil Procedure, summary

judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R. Civ.P. 56(c). The Supreme Court has recently stated that the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2512, (1986). . . . In reviewing a motion for summary judgment, however, all inferences "'must be viewed in the light most favorable to the party opposing the motion.'"

See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S.Ct. 1348, 1356-57 (1986) (quoting *United States v. Diebold*, Inc. 369 U.S. 654, 655(1962)).

Ralph Shrader, Inc. v. Diamond International Corp., 833 F.2d 1210, 1213 (6th Cir. 1987).

The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [he] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v.*

Catrett, 477 U.S. 317, 323 (1986). The substantive law of the case identifies which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Therefore, only disputes of facts affecting the outcome of the suit under the applicable substantive law will preclude the entry of summary judgment. *Id.* A moving party may discharge its burden "by 'showing' -- this is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 324-325. Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250. "[P]laintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in

his favor." *Id.* at 257.

The Court will address first plaintiffs' Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. claim. Plaintiff Mary Louise Taylor has alleged that defendants West and National Group of Companies, Inc. (National Group) discriminated against her through sexual harassment or by creating a sexually hostile or offensive work environment. It is well established that such a claim is cognizable in a Title VII action. *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 66 (1986); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986). The Sixth Circuit recently set forth the elements of a claim of sexual harassment for a hostile offensive work environment as follows:

[A] plaintiff, to prevail in a Title VII offensive work environment sexual harassment action, must assert and prove that: (1) the employee was a member of a protected class; (2) the employee was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (5) the existence of

respondeat superior liability.

Rabidue, 805 F.2d at 619-20. It also is well established that a superior can himself violate Title VII by sexually harassing a subordinate. See *Meritor Savings*, 477 U.S. at 64.

In reviewing the materials before the Court in a light most favorable toward plaintiffs, it is apparent that a genuine issue of material fact exists with regard to whether defendants West and National Group violated Title VII by creating a sexually hostile or offensive work environment. Although defendants have set forth facts which tend to indicate that no such environment existed and that any office horseplay was harmless and in a spirit of jocularity, plaintiffs countered those assertions by

pointing to portions of the record which tend to indicate a more offensive atmosphere which could fall within the realm of sexually hostile environment. This a precisely the type of genuine issue of material fact which precludes the Court from granting summary judgment in defendants' favor on the Title VII sex discrimination issue. Plaintiff Mary Taylor has presented evidence on this issue from which a jury could return a verdict in her favor.

With respect to plaintiffs' Title VII claim for discrimination based on religion, the Court agrees with defendants that the material before the Court fails to support such a claim. With the exception of defendant West's distributing to new employees a book which plaintiff interpreted to embrace

secular humanism, a philosophy allegedly at odds with her Christian faith, there is little or no evidence in the record as to religious discrimination. Moreover, the mere distribution of the book in question falls short of creating a genuine issue of fact with respect to religious discrimination. Thus, defendants are entitled to judgment as a matter of law on plaintiffs' claim of religious discrimination under Title VII.

Further, defendants Stoodt and Glick were not named in the Title VII claim; therefore, the Court questions whether it can maintain "pendent party" jurisdiction over them in the state claims. See *Aldinger v. Howard*, 427 U.S. 1 (1976), and *Young v. Consolidated Rail Corp.*, 710 F.Supp. 192 (E.D.Mich. 1989) to the effect that a party must be

subject to a federal claim before it is subject to a non-federal claim. See also, 1 Fed.Proc.L.Ed § 1:23. All of the parties are Ohio residents so there is no diversity. These matters have not been briefed by the parties so the Court will also address the merits.

Plaintiffs contend in Count II of the complaint that defendants subjected them to intentional inflection of emotional distress. Under Ohio law "'[one] who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.' Restatement of the Law 2d, Torts (1965) 71, Section 46(1)." *Yeager v. Local Union 20,* 6 Ohio St. 3d 369, 374

(1983). Liability exists under this cause of action "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Reamsnyder v. Jaskolski*, 10 Ohio St. 3d 150, 153 (1984).

The Court finds that the conduct of defendants as alleged by plaintiffs does not as a matter of law rise to the level of "extreme and outrageous" conduct as defined under Ohio law. Accordingly, defendants' motion for summary judgment is well taken as to Count II of the complaint.

With respect to plaintiffs' claim for defamation, the Court finds, even

construing the facts most favorably toward plaintiffs, that defendants are entitled to judgment as a matter of law. Although Ohio court have not to date specifically addressed the issue to whether statements made by a witness testifying at a Bureau of Employment Services hearing are subject to a qualified privilege, Ohio courts have held that the testimony of witnesses at a judicial proceeding is absolutely privileged. 35 O.Jur.3d *Defamation and Privacy* §77 (1982). Moreover, other jurisdictions have held that testimony or communications before an administrative tribunal with quasi-judicial powers is at least qualifiedly privileged. See *Perl v. Omni Int'l of Miami, Ltd.*, 439 So.2d 316 (Fla.App. 1983) (holding that testimony during administrative unemployment compensation case was absolutely

priviledged); *Circus Circus Hotels, Inc. v. Witherspoon*, 657 P.2d 101 (Nev. 1983); *Mock v. Chicago R.I. & P.R. Co.*, 454 F.2d 131 (8th Cir. 1972) (holding that proceedings before National Railroad Adjustment Board were quasi-judicial and thus pleadings before the board were absolutely privileged).

The Court is persuaded that, faced with the issue, the Ohio Supreme Court would recognize at least a qualified privilege for communications to the Bureau of Employment Services in light of the weight of authority on the issue in other jurisdictions. Similarly, statements made in good faith in a matter of common interest between an employer and an employee or between two employees regarding a third employee are subject to a qualified privilege. *Stearns v. Ohio*

Savings Assoc., 15 Ohio App. 3d 18 (1984). In order to overcome a qualified privilege, plaintiff must prove actual malice on the part of defendants. *Hahn v. Kotten*, 43 Ohio St.2d 237, 245 (1975). Plaintiffs have failed to set forth any evidence indicative of actual malice on the part of defendants with regard to any of the alleged defamatory statements. Accordingly, defendants are entitled to judgment as a matter of law on this count.

Plaintiffs have failed to set forth facts which indicate the presence of an implied contract of employment. The employee handbook to which plaintiffs refer the Court contains an express disclaimer indicating that the handbook itself creates no contractual rights. Plaintiffs correctly point out that an

oral contract can constitute an exception to the employment-at-will doctrine. *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100 (1985). However, plaintiffs have failed to set forth facts which indicate the presence of such an oral contract.

Finally, with regard to the loss of consortium claim of plaintiff Harold Taylor, the Court finds that no such claim is cognizable as a derivative of a Title VII claim which is plaintiffs' only remaining claim since no compensatory damages are available under Title VII[1] and such a claim is by its very nature one for compensatory damages.

With respect to plaintiffs' jury request, the Court is of the opinion that

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[1] *Farmer v. ARA Services, Inc.*, 660 F.2d 1096, 1107 (6th Cir. 1981).

there is no right to a trial by jury under Title VII. See generally, *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Flowers v. TRW, Inc.*, 680 F.Supp. 279 (N.D. Ohio 1987).

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendants' motion for summary judgment be, and hereby is, GRANTED IN PART AND DENIED IN PART; and it is

FURTHER ORDERED that plaintiffs' request for a jury be, and hereby is, DENIED.

/s/
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Bruce Comly French, a member of the Bar of the Supreme Court of the United States, certify that I have caused to be sent by first class mail, postage prepaid this 19th day of April 1991 an original and forty (40) copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to the Clerk of the United States Supreme Court, Washington, D.C. 20543 and three (3) copies each to the following:

Hon. James G. Carr
United States Magistrate
U.S. Court House and Custom House
1716 Spielbusch Avenue
Toledo, Ohio 43624
(Respondent)

Glenn E. Wasielewski, Esq.
P.O. Box No. 2328
Toledo, Ohio 43603
(Counsel for the Defendants in the District Court)

Jerry M. Johnson, Esq.
400 West North Street
Lima, Ohio 45801
(Counsel for the Defendants in the District Court)

and, on the 8th day of May, 1991, three (3) copies to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530

BRUCE COMLY FRENCH

NOTARIAL VERIFICATION

STATE OF OHIO

: SS

COUNTY OF HARDIN

Bruce Comly French appeared before me this 8th day of May, 1991, and stated upon his affirmation that the contents of this Certificate of Service are true.

H. Diane Botkin

NOTARY PUBLIC, STATE OF OHIO

My Commission Expires:

H. DIANE BOTKIN
NOTARY PUBLIC, STATE OF OHIO
My Commission Expires 2-6-95